No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent urges this Court to grant certiorari and then affirm the Ninth Circuit's rule that the omission of an element of an offense from a federal indictment cannot constitute harmless error. Br. 10. Respondent is correct that the question presented merits this Court's review. As explained in the petition, the question presented is the subject of a clear and entrenched circuit conflict; is a recurring and important question in federal prosecutions; and is squarely presented in this case. Respondent does not challenge any of those propositions, but instead argues only that the court of appeals correctly held, following its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), that the omission of an offense element from a federal indictment constitutes structural error necessiating automatic reversal. Respondent's various arguments on the merits do not detract from the need for this Court's review, and are in any event unsound.

1. As discussed at greater length in the petition for certiorari, the decision of the court of appeals in this case conflicts with the decisions of the majority of courts of appeals to have considered the issue, which have held that the omission of an offense element from a federal indictment is amenable to harmless-error analysis. See Pet. 8-9. The decision below is also inconsistent with this Court's precedents on harmless-error review—most notably, this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that a similar omission from the petit jury's instructions can constitute harmless error. See Pet. 9-16.

Faced with this overwhelming weight of authority, respondent contends only that *Neder* is distinguishable because it involves "trial error," rather than an error that occurs before the grand jury. Br. 8. Respondent, however, overlooks that this Court has repeatedly applied harmless-error analysis to errors that occur at the grand jury stage. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986); *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509-510 n.7 (1983). If anything, the fact that the error at issue in this case occurred at the grand jury stage renders it *more* susceptible, not less, to harmless-error review, insofar as it is the petit jury, not the grand jury, that provides the ultimate protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). Because the omission of an offense element from an indictment is closely analogous to the failure to obtain a finding by the petit jury on an offense element at trial, this Court's decision in *Neder* compels the con-

clusion that the former type of error, like the latter, can be reviewed for harmlessness.[1]

2. Respondent suggests (Br. 5) that the government's argument overlooks Federal Rule of Criminal Procedure 7(c)(1), which requires, *inter alia*, that an indictment contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." As respondent seemingly recognizes (Br. 5), however, that rule merely codifies the constitutional requirement that a federal indictment allege every element of an offense—and the related, but conceptually distinct, constitutional requirement that an indictment provide sufficient detail to inform the defendant of the nature of the charge against him. See, *e.g.*, 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.2(a), at 746 (2d ed. 1999).[2] To the extent this case involves an error un-

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[1] Respondent relies (Br. 8-9) on this Court's decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). *Sullivan*, however, is readily distinguishable. In *Sullivan*, the petit jury was given a constitutionally defective reasonable-doubt instruction, which undermined *all* of the jury's findings. *Id*. at 281. Here, by contrast, there is no dispute that the grand jury returned an indictment containing all but one of the elements of the offense of attempted unlawful reentry under 8 U.S.C. 1326(a), see Pet. 3, and that the petit jury returned a guilty verdict after being properly instructed concerning all of the elements of that offense, see Pet. 4.

[2] As noted in the petition (at 9-10 n.4), this case does not implicate the latter constitutional requirement. To the extent that respondent now contends (Br. 8) that the indictment failed to provide sufficient detail to place him on notice of the overt act on which the government would rely in prosecuting him for attempted unlawful reentry, that claim lacks merit, because a claimed lack of notice is readily amenable to review for prejudice, and respondent fails to establish that any such deficiency caused prejudice to his defense. See Pet. 10 n.4. Indeed, given that the indictment specified that the charged attempted unlawful reentry occurred on a single, identified date and the proof entailed a

der Rule 7(c)(1) as well as a constitutional error, respondent does not demonstrate how that fact bears on whether harmless-error analysis is appropriate here.

3. Respondent contends (Br. 6) that the government "seeks to eliminate [the] distinction" between preserved and unpreserved errors. That contention lacks merit. In *Cotton*, this Court held that the failure to allege a sentence-enhancing fact in a federal indictment (and to obtain a finding on that fact from the jury at trial) did not constitute reversible error under the four-part plain-error test applicable when an objection has not been preserved. 535 U.S. at 634. Specifically, the Court concluded that the fourth component of that test was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 632-633. Although that conclusion strongly suggests that such an error is amenable to harmless-error analysis when an objection *has* been preserved, see Pet. 12-13, it does not follow that *Cotton* would somehow be supplanted, and the distinction between preserved and unpreserved errors eradicated, if the Court were to agree that an indictment error can be harmless. Instead, *Cotton* would continue to govern the plain-error analysis in cases in which an objection has not been preserved—and the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), would apply in cases in which an objection has been preserved. Cf. *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993) (noting distinctions, including burden of proof, between plain-error and harmless-error cases).

4. Finally, respondent seemingly attaches significance (Br. 10) to the fact that, under Ninth Circuit law

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single effort at the border to gain admission, Pet. 2-3, it is difficult to see how petitioner could possibly have been prejudiced.

at the time of the indictment, it was clear that the commission of an overt act was an element of the offense of attempted unlawful reentry. Respondent does not contend, however, that the rule he advocates would apply only in cases in which a prosecutor fails to allege what is indisputably an offense element, and not in cases in which there is uncertainty as to what constitute the elements of the given offense. In any event, because the omission of an offense element from a federal indictment does not "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 629-630 (1993), or "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), it should not automatically require reversal in either situation. And because the government has conceded, for purposes of this petition (see Pet. 9 n.3), that the indictment in this case was constitutionally deficient because it did not allege one of the elements of the charged offense,[3] this case constitutes a suitable—indeed, optimal—vehicle for consideration of the recurring and important question presented.

[3] Specifically, the government does not dispute, for purposes of the petition, that the commission of an overt act was an element of the offense of attempted unlawful reentry, see *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc), and that the indictment failed to allege that element implicitly by alleging that respondent had engaged in an "attempt[]" to reenter unlawfully, see Pet. App. 2a. Because the indictment did allege that respondent had acted "knowingly and intentionally" in attempting to reenter the United States, see *ibid.*, this case does not implicate the validity of the Ninth Circuit's further holding that another element of the offense of attempted unlawful reentry is that the defendant have acted with "a specific intent to enter illegally," *Gracidas-Ulibarry*, 231 F.3d at 1192.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

MARCH 2006